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In the Supreme Court of the United States

CONGRESSWOMAN SHEILA JACKSON LEE AND
CONGRESSWOMAN EDDIE BERNICE JOHNSON,
Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the Constitution's silence on the question of mid-decade redistricting precludes a state legislature from replacing a court-drawn plan with a legislatively drawn plan.

2. Whether Appellants have demonstrated a Section 2 vote-dilution claim on this record.

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On Appeal from the United States District Court for the Eastern District of Texas

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, Appellees the State of Texas, Texas Governor Rick Perry, Texas Lieutenant Governor David Dewhurst, Texas House Speaker Tom Craddick, and Texas Secretary of State Geoffrey S. Connor (collectively, "the State") move to summarily affirm the judgment of the three-judge court on the ground that the arguments presented are so insubstantial as not to warrant further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

Following the 1990 decennial census, in 1991 the Texas Legislature adopted a congressional redistricting plan for the State of Texas. Since Reconstruction, Texas voters had been reliably Democratic, but, in the 1980s and 90s, they began voting more and more Republican. The 1991 plan, whose design has been credited in large part to Appellant Congressman Martin Frost, has been described by neutral observers as the "shrewdest" Democratic

gerrymander of the 1990s. J.S. App., at 55 (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1448).[1]

Over the next twelve years, that plan was judicially modified twice,[2] including in 2001 when two new congressional seats were added after the 2000 census. J.S. App., at 164. But, throughout those modifications, the basic contours of the plan remained the same,[3] preserving the districts of incumbent Democratic Members of Congress despite the growing Republican leanings of the Texas electorate.[4]

In 2003, for the first time in over a decade, the Texas Legislature passed a congressional redistricting plan, Plan 1374C.

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1. Appellants' jurisdictional statement will be cited as "J.S.," and their appendix items will be cited as "J.S. App."

2. In 1996, three of Texas's then-thirty congressional districts were redrawn as part of the *Bush v. Vera* litigation. *See* 933 F.Supp. 1341 (S.D. Tex. 1996), *remanded from Bush v. Vera*, 517 U.S. 952 (1996), *aff'g*, *Vera v. Bush*, 861 F.Supp. 1304 (S.D. Tex. 1994) (finding these three districts unconstitutional but staying the effect of its decision pending appeal); *see also Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997) (leaving the court-drawn districts in place).

3. In 2001, the federal court plan added two seats while causing the least disruption to the existing plan, J.S. App., at 170; *see also id.*, at 171 ("It was plain that . . . no incumbent was paired with another incumbent or significantly harmed by the plan."). As a result, all 28 incumbents who ran for reelection won back their seats.

4. By 2002, Texas voters had elected Republicans to 27 out of 27 statewide elected offices and to majorities in both Houses of the State Legislature. *See* http://www.sos.state.tx.us/elections/historical/; *see also* J.S. App., at 4. The Republican candidate for governor in 2002 prevailed with 58 percent of the vote, *id.*, and the Republican candidate for governor in 1998 garnered 69 percent of the statewide vote, *id.* Nevertheless, despite these statewide voting trends, in 2002 Democrats still maintained a majority in congressional delegation, which was split 17 to 15. *Id.*

That plan undid the preexisting Democratic gerrymander, jeopardized the reelection chances of several incumbent Democratic Congressmen, and created an additional African-American and an additional Hispanic opportunity district in Texas. This litigation immediately ensued.

Following extensive discovery, two weeks of trial, and dozens of witnesses, the three-judge federal court affirmed the legality of the plan in all respects. The court engaged in a careful weighing of the evidence, assessed the credibility of the witnesses, sifted through the facts concerning each contested congressional district, and issued a detailed and thorough 99-page opinion affirming the legality of Plan 1374C.

Appellants' Statement of the Case presents only selected testimony that is contrary to the three-judge court's factual findings and credibility determinations.[5] Appellees refer the Court to the

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5. For example, any suggestion by Appellants that the remedy imposed in Texas's 2001 redistricting litigation was intended to foreclose further legislative action is inaccurate. *See* J.S., at 15 & n.6. The 2001 remedy was a court-drawn plan (Plan 1151C) that rectified a lack of equipopulosity due, in part, to Texas's two newly awarded congressional seats. *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov. 14, 2001) (three-judge court) (J.S. App., at 164), *aff'd*, 536 U.S. 919 (2002). The court expressly invited those not happy with the remedial map it had drawn to seek relief in the Texas Legislature. J.S. App., at 176-77. Specifically, although several groups had urged the creation of additional majority-minority districts, the Court concluded that "[t]hese districts are not required by law." J.S. App., at 172. Thus, these permissive districts "could be created by the State . . . . Whether to do so is, however, a quintessentially legislative decision, implicating important policy concerns." J.S. App., at 172. Accordingly, the Court concluded that "the matter of creating such a permissive district is one for the legislature," J.S App, at 176, and the "arguments so ably presented" on behalf of such districts "are directed to the wrong forum," J.S. App., at 176. In 2003,

three-judge court's careful evaluation of Appellants' evidence, including the testimony of their expert, Dr. Murray. *See* J.S. App., at 119-24.

ARGUMENT

The judgment below has yielded five separate appeals to this Court.[6] Four of the jurisdictional statements challenge what they term "mid-decade" redistricting. Although the Texas Legislature had not passed a congressional redistricting plan for twelve years, the appellants repeatedly frame their challenge as one to state legislatures' revisiting redistricting multiple times in a single decade.

In the face of explicit constitutional language and Supreme Court precedent making clear that it is the prerogative and primary responsibility of state legislatures to redistrict, the appellants ask the courts to engraft an additional limitation onto the Constitution.

Each set of appellants has a different theory as to why they believe "mid-decade" redistricting should be judicially prohibited: the *Jackson* appellants urge a fusion with the Court's political gerrymandering cases; appellant Henderson relies on a federal statute, 2 U.S.C §2c; the Travis County appellants suggest modifying the "one-person, one-vote" standards to require updating the census count more often than once a decade; and Congresswomen Lee and Johnson, Appellants in the instant proceeding, rely on the Census Clause of the U.S. Constitution.

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the Legislature accepted the court's invitation and, in Plan 1374C, created the two additional minority opportunity districts that plaintiffs had sought in *Balderas*.

6. In addition to this appeal, see also *Jackson v. Perry*, (No. 03-1391); *American GI Forum v. Perry*, (No. 03-1396); *Travis County v. Perry*, (No. 03-1400); *Henderson v. Perry*, (No. 03-9644).

Although creative, none of these theories is persuasive. Each will be addressed in the relevant Motion to Affirm.[7]

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

On the issue of "mid-decade" redistricting, these appeals present no split of authority whatsoever. Nor do they implicate the broad policy specter repeatedly invoked—that of state legislatures returning seriatim, year after year, to redistrict throughout the decade. The facts of this case do not present the Court with an opportunity to address that question. Rather, this case concerns a factbound application of settled law to the unremarkable circumstances of a legislature adopting a redistricting plan following a judicial remedial plan that expressly invited the Legislature to do so. Given that the Texas Legislature had not adopted a congressional redistricting plan for twelve years prior, the issue of "mid-decade" redistricting simply is not presented.

The three-judge court unanimously rejected all of the challenges to so-called "mid-decade" redistricting. The majority opinion painstakingly refuted the appellants' individual arguments, J.S. App., at 5-27, and Judge Ward's limited dissent explicitly "join[ed] the court's decision that the Elections Clause does not prohibit mid-decade redistricting." J.S. App., at 125.

The one additional argument raised by Appellants Congresswomen Lee and Johnson—that the alterations of Congressional Districts 18 and 30 violated section 2 of the Voting Rights Act—was also unanimously rejected by the court below. The majority reviewed the evidence and found no "support [for] their claim of dilution, present or threatened." J.S. App., at 120. And Judge Ward expressly agreed: "I agree that no violation of the

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7. Because of these similarities, Part I of this motion to affirm necessarily covers the same ground as the respective Part I in the motions to affirm filed in those other appeals.

Voting Rights Act has been shown with respect to Districts 18 and 30." J.S. App., at 126.

I. THERE IS NO PROHIBITION ON "MID-DECADE" REDISTRICTING.

A. The Constitution Gives State Legislatures the Primary Responsibility for Redistricting.

Article I, section 4 of the United States Constitution, known as the Elections Clause, expressly delegates power over congressional districting to the state legislatures:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, §4, cl. 1 (emphasis added).

This Court has held that the power delegated to States includes the power to draw congressional districts. *See Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, §4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). And, the Court has repeatedly held, "the Constitution leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); *Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature.").

Moreover, under Texas law, "[t]he Legislature is the department constitutionally responsible for apportioning the State into federal congressional legislative districts." *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001); *see also* TEX. CONST. art. III, §1 ("The Legislative

power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'").

B. Congress Has Not Exercised Any Power to Regulate the Frequency with Which State Legislatures May Redistrict.

The words "Times, Places, and Manner" in the federal Elections Clause are "comprehensive words embrac[ing] authority to provide a complete code for congressional elections," subject to Congress's power also to enact laws over the same subject matter. *Smiley*, 285 U.S., at 366-67. As Alexander Hamilton explained, because it was not feasible to insert an entire election code into the Constitution, "a discretionary power over elections ought to exist somewhere." THE FEDERALIST No. 59 (A. Hamilton). The method "with reason . . . preferred by the convention" was to give power "primarily" in the state legislatures but with "ultimat[e]" oversight by Congress. *Id.*

Congress has on occasion used its power under Article I, §4 to enact "such regulations." *See* U.S. CONST. Art. I, §4, cl. 1. For example, Congress has provided a uniform day for congressional elections. *See* 2 U.S.C. §7. Congress has provided that votes for congressional candidates must be by written or printed ballots. *See* 2 U.S.C. §9. And, in regard to congressional districting, Congress has provided that Members of the House must be elected from single-member districts rather than the previously accepted practices of at-large statewide seats or multi-member districts. *See* 2 U.S.C. §2c ("[T]here shall be established by law a number of districts equal to the number of Representatives.").

Thus, there is no dispute that, pursuant to the second part of the Elections Clause ("Congress may at any time by Law make or alter such Regulations"), Congress could have chosen to prohibit mid-decade redistricting. But, critically, Congress has not done so. No federal statute speaks at all to *when or how often* a State can redraw

its congressional districts. And, absent congressional prohibition, state legislatures retain broad authority over the decision to redistrict.

C. Federal Courts Have Repeatedly Recognized the Limited Nature of Court-Drawn Plans and the Primacy of State Legislative Plans in the Constitutional Scheme.

Given this broad grant of constitutional authority, when federal courts are forced to step into redistricting, they do so in a limited way that recognizes the "primary jurisdiction" of the state legislatures in this field. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam). Federal courts treat it as an "unwelcome obligation [to] perform[]in the legislature's stead," because, in the words of the Court, "a state legislature is the institution that is by far the best situated" to undertake redistricting. *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). A federal court, meanwhile, "lack[s] the political authoritativeness that the legislature can bring to the task." *Id.*, at 415. "Federal courts, unlike state legislatures, are not in a position to reconcile competing state policies on the electorate's behalf, nor at liberty to engage in political policy-making decisions. . . . [Courts] do not possess the latitude afforded a state legislature to advance political agendas." *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 628 (D.S.C. 2002); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

Accordingly, federal court-ordered redistricting plans are focused on remedying violations of the Constitution or of the Voting Rights Act. As the three-judge court noted in adopting the 2001 Texas congressional map: "The Congress has by its enactment of voting rights laws constrained the political process and given the courts a role—to the extent of those constraints. We have no warrant to impose our vision of 'proper' restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act." J.S. App., at 176; *see also* J.S. App., at 164,

167-78, 172, 173 (noting limited nature of the federal court role); *accord Upham*, 456 U.S., at 43 (holding that unless the plan violated the Constitution or the Voting Rights Act, "the District Court was not free . . . to disregard the political program of the Texas State Legislature").

As the Court has noted concerning the Voting Rights Act,

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan *pending later legislative action.*" *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

These basic principles—that state legislatures have "primary jurisdiction" over redistricting, are the institution appropriate for the political nature of the task, and can best weigh competing state policies that go beyond minimum compliance with the law—lead to an inexorable result: the mere fact of a court-ordered plan does not foreclose a subsequent, legislative congressional redistricting plan, even within the same decade. *See Johnson v. Miller*, 922 F.Supp. 1556, 1569 (S.D. Ga. 1995) ("We do no harm with this plan, which cures the unconstitutionality of the former and can serve in "caretaker' status until the legislature convenes to change it. *That may occur following the millennium census, or before.*") (emphasis added), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

The presence of a prior court-ordered remedial plan does nothing to alter the Legislature's authority to adopt a subsequent redistricting plan. Indeed, one need no look no further than Texas's own history of congressional redistricting to find repeated examples of courts deferring to the primary responsibility of the state legislature to draw its own congressional districts, even

immediately after a court-ordered remedial plan. *See* J.S. App., at 9 n.14 (collecting cases).[8]

Consistent with this long line of cases, nothing in the three-judge court's *Balderas* decision in 2001 purported to divest the

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8. For example, in *Bush v. Martin*, 251 F.Supp. 484, 516 (S.D. Tex. 1966), the district court upheld a redistricting plan as minimally constitutional and expressly refuted the argument that the Legislature could not later alter it, even before the next decennial census: "That we do not find [the plan] deficient enough to set it aside and install one of our own is a long way from holding that it is free from shortcomings or that such shortcomings may somehow get frozen into the legislative thinking (or our own) as adequate criteria for the future." In *White v. Weiser*, 412 U.S. 783 (1973), the district court had indicated that its remedial plan was without prejudice to consideration and adoption of any new plan by the Legislature before the next census. *Id.*, at 789. And even that limited order was too broad, and stayed by this Court, because it had unnecessarily deviated from the policy choices made by the Texas Legislature. *Id.*, at 795-97. Likewise, in *Upham*, the Court reversed a district court remedial plan as not "closely approximat[ing] the state-proposed plan." 456 U.S., at 42. In determining whether to allow the now-disapproved district-court plan to be used in the imminent elections, the Court expressly noted that it was "only an interim plan *and is subject to replacement by the legislature in 1983*." *Id.*, at 44 (emphasis added).

In *Vera v. Bush*, 933 F.Supp. 1341 (S.D. Tex. 1996), the court found the legislative plan to be unconstitutional and ordered its own plan as an interim replacement. *Id.*, at 1346, 1353. In response to an argument that the court should allow the 1996 elections to proceed under the old map, the court replied that the Legislature would be free to implement its own map when it met again: "[Texas Lieutenant Governor] Bullock and [House Speaker] Laney contend that the Texas Legislature is ready and willing to redistrict during its 1997 regular session. Of course, in any event, they will have that opportunity . . . ." *Id.*, at 1346; *see also id.*, at 1353. And in *Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997), after the Texas Legislature failed to enact its own plan in 1997, the district court left its own interim plan in place for the 1998 election cycle. *Id.*, at 254. The court, however, explicitly recognized that the Legislature was free to enact its own congressional redistricting plan as a replacement when it next met. *Id.*, at 252-53.

Texas Legislature of authority to redistrict in the future. Indeed, the Legislature acted promptly, accepting the court's express invitation to undertake this "quintessentially legislative" task and create two new minority-opportunity districts in Texas through Plan 1374C. J.S. App., at 176-77. There is simply no authority for Appellants' argument that use of the *Balderas* court-ordered plan in the 2002 election cycle somehow precluded Plan 1374C.

II. THE CENSUS CLAUSE DOES NOT BAR "MID-DECADE" REDISTRICTING.

A. The Census Clause Relates to Apportionment of Seats Among States, Not Intrastate Redistricting.

The three-judge court correctly rejected Appellants' argument that the Census Clause, U.S. CONST. art. I, §2, cl. 3, is a constitutional bar to the Texas Legislature's replacement of a court-drawn map with a legislatively enacted one. *See* J.S. App., at 12-15. As the three-judge court noted, the Census Clause does not expressly limit intrastate congressional districts. *See* J.S. App., at 12. And the relevant constitutional provision—the Elections Clause, *see* U.S. CONST. art. I, §4—is a broad grant of authority to state legislatures, subject to congressional regulation that has not been exercised in this area. *See* J.S. App., at 14-15.

Appellants' argument misreads the Census Clause, which by its terms applies only to *inter*state reapportionment of congressional seats by the federal government, not *intra*state district-drawing by state legislatures. The Census Clause states:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . ." U.S.

> CONST. art. I, §2, cl. 3. See also *id.*, am. XIV, §2 (providing that apportionment among States is now based on the "whole number of persons").

The Census Clause concerns "apportion[ment] *among* the several States." *Id.*, art. I, §2, cl. 3 (emphases added). The text says nothing at all about redistricting *within* a particular State. Rather, the Census Clause provides for a national census to allocate representatives—and, hence, both power in the lower house of the federal Congress and responsibility to pay any "direct Taxes" from the States—proportionate to the relative population of each State. *See, e.g.*, THE FEDERALIST No. 54 (J. Madison) (explaining how "the establishment of a common measure for representation and taxation will have a salutary effect"); THE FEDERALIST No. 58 (J. Madison) (explaining how large States would be motivated to reapportion congressional seats). As the three-judge court noted, "[i]t ensures that no state is over-represented in the House by linking each state's delegation to the state's population." J.S. App., at 12.

Likewise, this Court recently explained the "basic purposes of the Census Clause":

> "[The Census] Clause reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the States, would determine the manner of conducting the census. *See Wesberry v. Sanders*, 376 U.S. 1, 9-14 and n.34 (1964); 1 Farrand 35-36, 196-201, 540-542, 559-560, 571, 578-588, 591-597, 603; 2 *id.* at 2-3, 106; [2 THE FOUNDERS' CONSTITUTION (ed.] Kurland & Lerner[), at] 86-144; *see* THE FEDERALIST No. 54, at 336-341 (C. Rossiter ed. 1961) (J. Madison); *id.* No. 55, at 341-350 (J. Madison); *id.* No. 58, at 356-361 (J. Madison); 31 WRITINGS OF GEORGE WASHINGTON, at 329.

These basic determinations reflect the fundamental nature of the Framers' concerns." *Utah v. Evans*, 536 U.S. 452, 477-78 (2002).

None of the Census Clause's purposes relates in the least to the redrawing of *intra*state congressional districts. Nor does anything about *inter*state allocation of taxes or representation bear on the question of whether a particular State is constrained about when it may draw its own congressional districts.

Appellants' reading of the Census Clause is also inconsistent with more than two centuries of practice under the Constitution. For the first fifty years, it was common for States to elect Representatives by at-large statewide elections rather than in single-member districts. *See Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). That practice belies any understanding that there was a constitutional compulsion to draw *intra*state districts at all, let alone at any fixed interval.[9]

The three-judge court therefore correctly observed that the "Clause says nothing about how district lines must be drawn," and, although the decennial census may now set a minimum frequency of redistricting to satisfy equipopulosity (because Congress has now by statute required single-member districts), "the Census Clause does not expressly limit the stated ability to redistrict more frequently." J.S. App., at 12-13.

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9. In modern times, multi-member and at-large congressional districts are generally prohibited by statute. *See* 2 U.S.C. §2c; *Branch v. Smith*, 528 U.S. 254, 266-67 (2003). But, even today, it is permissible for at-large elections to be held in exigent circumstances. *Id.*, at 279. Absent these statutes, such at-large seats would be constitutionally permissible because the rule of absolute population equality "is followed automatically, of course, when Representatives are chosen as a group on a statewide basis . . . ." *Wesberry*, 376 U.S., at 8.

B. Appellants Improperly Seek to Engraft Additional Limitations onto the Explicit Constitutional Grant of Authority to State Legislatures.

Appellants argue that the state legislatures are powerless to enact a redistricting plan mid-decade because the "United States Constitution is silent regarding repeated reapportionment (more than every ten years)." J.S., at 14. They argue that, by allowing the Texas Legislature to enact a redistricting plan, the three-judge court "engraft[ed]" a new power into the Constitution in violation of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). *See* J.S., at 14-15 (citing J.S. App., at 13).

Appellants' argument seriously mischaracterizes *U.S. Term Limits*. As the court below noted, "*U.S. Term Limits* was not based on the Elections or Census Clauses, but on the Qualifications Clause of Article I." J.S. App., at 13. And the Qualifications Clause, unlike the Elections Clause, by its terms allocates no responsibility to the States:

> "No person shall be a Representative who shall not have attained to the Age of twenty five years, and have been seven Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, §2, cl. 2. *See also* U.S. CONST. art. I, §5 (making the House the sole judge of the qualifications of its members).

Lacking any Article I basis for regulatory authority, the State in *U.S. Term Limits* argued unsuccessfully that its source of authority to regulate ballot access—and to add conditions to the qualifications for Congress beyond those found in Article I, §2—emanated from its general reserved powers under the Tenth

Amendment. *U.S. Term Limits*, 514 U.S., at 785.[10] The Court rejected that proposition. *Id.*, at 805.

Here, by contrast, the source of state power to draw districts is express: the explicit *grant* of such power to state legislatures by Article I, §4, cl. 1. And here, it is Appellants who ask the courts to engraft additional limitations not found in the constitutional text.

Thus, the holding of *U.S. Term Limits* undermines, rather than supports, Appellants' argument. In *U.S. Term Limits*, the Court held that it was improper to engraft new congressional-election qualifications onto the plain text of Article I, §§2 and 5. Here, the situation is reversed. Article I, §4—which governs redistricting—delegates the primary responsibility for redistricting to the States. *See* U.S. CONST. art. I, §4. And it is Appellants—like the losing party in *U.S. Term Limits*—who seek to add words of limitation to the Constitution's plain language.

Therefore, the three-judge court properly rejected Appellants' request,

> "to add an implicit limitation to the Elections Clause that states may prescribe the 'times, places, and manner' of holding elections only after each decennial census. There is no basis for this addition, either in the text of the Constitution or in court decisions interpreting it." J.S. App., at 15.

For the same reason, Appellants' "mid-decade" redistricting argument does not present a substantial question.[11]

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10. Although the State also raised Article I, section 4 as an alternate source of authority, the Court determined that—with respect to candidate qualifications—Article I, section 4 did not allow States to add to the textual requirements of Article I, sections 2 and 5. *See U.S. Term Limits*, 514 U.S., at 832-35.

11. In a footnote, but not in their Questions Presented, Appellants suggest that collateral estoppel should also have barred the Texas Legislature from enacting a redistricting plan. J.S., at 15 n.6. That argument is baseless for, among other reasons, those stated by the three-

III. APPELLANTS DID NOT PROVE A VALID VOTE-DILUTION CLAIM UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

A. Appellants' Argument About Partisan Intent Is Irrelevant to a Section 2 Claim and, in Any Event, Was Not Preserved.

For the first time on appeal, Appellants argue that they can prove a Section 2 claim by focusing on partisan intent rather than meeting the other doctrinal requirements. J.S., at i; *see also* J.S., at 18 (suggesting partisan motives are enough if changes in a district "dilute the minority population *in a real world sense*" (emphasis added)). Appellants never asked the three-judge court to rule on such a legal question. Nor is it a substantial question.

Appellants' new theory cannot be squared with the text, history, or purpose of the Voting Rights Act. By its text, Section 2 reaches voting practices that abridge the right to vote "on account of race or color" by causing a "protected" "class of citizens" to "have less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice." 42 U.S.C. §1973(b). The text makes clear that the Act was aimed at remedying racial inequality, not removing partisanship from the political process. Allegations of partisan intent by their nature would not be "on account of race or color." *Id.*

Appellants' theory that partisanship alone can prove a violation of Section 2 also would contravene *Thornburg v. Gingles*, 478 U.S. 30 (1986). In order to prove a Section 2 violation, Appellants were required to satisfy three "necessary preconditions": (1) a minority racial group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the group must be politically cohesive; and (3) bloc voting by an Anglo majority must usually defeat the minority group's preferred candidate. *Gingles*, 478 U.S., at 50-51. Although *Gingles* involved multi-member districts, its preconditions apply to challenges to single-member plans, *Growe v. Emison*, 507 U.S. 25, 40 (1993),

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judge court in rejecting the argument. *See* J.S. App., at 25-26.

and are necessary prerequisites to all Section 2 vote-dilution challenges. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994); *Voinovich v. Quilter*, 507 U S. 146, 157-58 (1993). If these preconditions are met, the trial court must also consider the totality of the circumstances. *Gingles*, 478 U.S., at 79; *see also De Grandy*, 512 U.S., at 1011 (holding that the three *Gingles* preconditions were necessary but not sufficient).

That Appellants attribute partisan motives to the mapmakers cannot excuse them from satisfying the *Gingles* preconditions. The Court has explained that Section 2 "focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate §2; where such an effect has not been demonstrated, §2 simply does not speak to the matter." *Voinovich*, 507 U.S., at 155. The statute "speaks only of results and makes no distinction between the intentional and unintentional causes thereof." *Turner v. Arkansas*, 784 F.Supp. 553, 569 (E.D. Ark. 1991), *aff'd*, 504 U.S. 952 (1992). Appellants' argument to the contrary is not substantial.

B. The Three-Judge Court Rightly Concluded That Appellants Had Failed to Prove a Vote-Dilution Claim.

The three-judge court analyzed the evidence presented by Appellants and unanimously held that it did not prove that any dilution would occur.[12] J.S. App., at 119-24; *id.*, at 126 (Ward, J., concurring in part and dissenting in part). The court weighed the evidence presented, paying particular attention to the data and methodology employed by Appellants' expert Dr. Richard Murray. *Id.*, at 120-23. From that evidence, the court properly concluded that both District 18 and District 30 remained effective African-American opportunity districts under the State's plan. *Id.*, at 120.

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12. Moreover, to the extent that Appellants' argument alleges possible retrogression, it is already precluded by the Justice Department's preclearance of Plan 1374C.

The heart of Appellants' theory is that a shift in district lines has slightly increased the Hispanic population of each district. J.S., at 21-22, 24. In the circumlocution of the jurisdictional statement: "Minority citizens' voting strength is diluted by moving out high voting minority citizens and replacing them with low voting minority groups." *Id.*, at 21. Appellants call this slight increase in integration "dilution . . . in a real world sense," *id.*, at 18, but they failed to establish dilution in a *legal* sense.

The data presented to the district court, however, belie Appellants' contentions. After hearing all the evidence, the three-judge court made the factual finding that "Congressional Districts 18 and 30 are effective African-American opportunity districts under Plan 1374C." J.S. App., at 120.[13]

The court found that district 18 would "retain a strong African-American majority." *Id.* The new District 18 has "an African-American voting age population of 40.3% and an African-American citizen voting age population of 48.3%." *Id.*, at 121. After considering the effect of the "only slight []" changes in composition from the old plan and election data in both the old and new districts, and detailed election data from prior elections, the three-judge court concluded: "These changes are too slight to support the claim that the strength or status of Congressional District 18 . . . is diluted." *Id.*, at 121-22.

For District 30, the three-judge court conducted a similar analysis and reached the same conclusion. *Id.*, at 122-23. In the new plan, the district has a "Black citizen voting age population [of] 50.6%, which is 'slightly more' than in the old plan. *Id.*, at 122. Congresswoman Johnson herself testified that the district would continue to elect the African-American candidate of choice. *Id.* And the Court's evaluation of the expert testimony—including

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13. Notably, Plan 1374C maintains Districts 18 and 30 as African-American opportunity districts *in addition* to creating a third African-American opportunity district in Texas, new Congressional District 9.

a comprehensive examination of historical election results in the old and new districts—confirmed her conclusion. *Id.*, at 122-23.[14]

Indeed, no party disputed that Congresswomen Eddie Bernice Johnson and Sheila Jackson Lee are the African-American communities' candidates of choice in their respective districts, and both Congresswomen agreed that they will continue to be elected in their districts under Plan 1374C. Tr. 12/17/03 PM at 164:22-23 (Eddie Bernice Johnson) ("To be quite honest with you, I'm not worried about winning."); Tr. 12/18/03 AM at 124:8-19 (Sheila Jackson Lee).

Accordingly, Appellants have failed to present a substantial question to this Court concerning whether the three-judge court erred in finding that they had failed to prove that Districts 18 and 30 violate section 2 of the Voting Rights Act.

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14. The three-judge court also rightly rejected an attempt by Appellants to argue that another district—a Latino district—was required in Dallas. J.S. App., at 124. There is no basis to think that either Appellant has standing to press such a theory. And as the court noted, there was no *Gingles* analysis presented on the question "and the record does not suggest that [such an analysis] could be provided." J.S. App., at 124.

CONCLUSION

The Court should summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

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